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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS HILL,

Defendant and Appellant.

C050398

(Super. Ct. No. 03F08578)

Defendant Thomas Hill appeals from a conviction on two counts: assault with a deadly weapon by a prisoner not serving life, and possession of a deadly weapon. (Pen. Code, §§ 4501, 4502, subd. (a), respectively.)¹ He contends the trial court abused its discretion in denying his *Marsden*² motion and in failing to consider his *Faretta*³ motion. Defendant also contends

¹ Undesignated section references are to the Penal Code.

² *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

³ *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562] (*Faretta*).

that the weapon possession verdict is defective. We will correct a clerical error in the verdict and otherwise affirm the judgment.

BACKGROUND

On May 5, 2003, while incarcerated, defendant stabbed his cellmate, Kenneth Fowler, 12 times in the arms and once in the left thigh with an inmate-manufactured weapon. A correctional officer, who was working the control booth, heard a yell for help coming from defendant's cell, and observed defendant making jabbing motions toward Fowler. Officers responding to the attack saw defendant flush the toilet. Later the weapon was recovered from that toilet.

Defendant maintains that Fowler initiated the attack by coming at him with the weapon. Defendant wrestled the weapon away from him, but Fowler continued to come at him, swinging his arms wildly. Defendant raised the weapon in defense as Fowler continued to run into it. Defendant testified that he later attempted to flush the weapon down the toilet to prevent Fowler from retaking it.

DISCUSSION

1. *Marsden Motion*

During trial, defendant complained to the court that his appointed attorney was refusing to call Fowler, the victim, and Cornelius, Fowler's new cellmate, to testify. Pursuant to *Marsden*, defendant moved to relieve his attorney.

At the *Marsden* hearing, defense counsel explained that he had decided not to call Fowler because he foresaw only three possible outcomes: Fowler could refuse to testify, or he could testify that defendant initiated the attack, neither of which would help defendant's case. Alternatively, if Fowler testified to initiating the attack, defense counsel believed that the prosecution would introduce evidence that both defendant and Fowler were affiliated with a prison gang, the Skins. Defense counsel believed that evidence of gang affiliation would outweigh any beneficial testimony Fowler could provide.

As to Cornelius, defense counsel explained that even if Cornelius's testimony could overcome hearsay obstacles, it would still open the door to introduction of prejudicial prison gang evidence.

The trial court denied the *Marsden* motion, finding defense counsel's decision not to call Fowler and Cornelius was supported by sound tactical reasons.

Defendant contends the trial court erred in denying his *Marsden* motion because defense counsel failed to provide effective assistance by not interviewing Fowler and Cornelius to ascertain what they would testify to if called. Defendant urges that, had Fowler testified to initiating the attack, it would have constituted exculpatory evidence. Moreover, defendant claims, evidence of gang affiliation would not have been any more prejudicial than the fact that defendant was a prisoner. Defendant argues defense counsel could not make a

reasonable tactical decision not to call Fowler or Cornelius without knowing what they would testify to. We disagree.

Under the federal Constitution's Sixth Amendment, a defendant may substitute an appointed attorney if the record clearly shows that the attorney is not providing adequate representation or that defendant and counsel have an irreconcilable conflict likely to result in ineffective representation. (*People v. Welch* (1999) 20 Cal.4th 701, 728 (*Welch*).)

A trial court's decision not to relieve counsel is reviewed under the deferential abuse of discretion standard. (*People v. Jones* (2003) 29 Cal.4th 1229, 1245.) Under this standard, as long as there is a reasonable, or even fairly debatable, justification for the trial court's action, it will not be overturned. (See *Gonzales v. Nork* (1978) 20 Cal.3d 500, 507.)

When a defendant chooses to be represented by professional counsel, he cedes the ability to make all but a few fundamental decisions. (*Welch*, supra, 20 Cal.4th at p. 729.) "Tactical disagreements between [a] defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.'" (*Id.* at pp. 728-729.)

Here, defendant is correct that defense counsel did not know exactly what Fowler or Cornelius would testify to if called as witnesses. However, at the *Marsden* hearing, defense counsel explained that he had considered every scenario of Fowler and Cornelius testifying, and he articulated reasonable grounds why it was in defendant's best interest not to call them to testify.

Knowing precisely what Fowler and Cornelius would testify to would not have changed this comprehensive calculus.

We find nothing in the record to suggest that defense counsel's decision not to call Fowler or Cornelius was an unreasonable tactical decision or likely to result in ineffective representation. We therefore find that the trial court did not abuse its discretion in denying defendant's *Marsden* motion to relieve counsel.

2. *Faretta* Motion

Defendant contends that if his motion to relieve counsel was actually a request for self-representation under *Faretta*, the trial court abused its discretion in failing to consider the relevant *Faretta* factors. (*Faretta, supra*, 422 U.S. 806.) Defendant maintains that because he did not explicitly request new counsel in his *Marsden* motion, but simply asked that present counsel be relieved without himself mentioning *Marsden*, he may have been requesting permission to represent himself. We disagree.

A defendant has a constitutional right to represent himself. (*People v. Hines* (1997) 15 Cal.4th 997, 1028.) However, to invoke that right, he must unequivocally assert it. (*Ibid.*)

Courts have repeatedly held that equivocal requests for self-representation are inadequate under *Faretta*. For example, in *People v. Marshall* (1997) 15 Cal.4th 1, 25-26, defendant's statement that he wanted to "'take the pro per status'" among other ramblings and requests for time to think,

was found to be equivocal for the purpose of a *Faretta* motion. Here, defendant's alleged *Faretta* motion, based simply on a motion to relieve counsel, failed to rise even to the level of *Marshall*.

We conclude the trial court did not abuse its discretion concerning any potential *Faretta* motion.

3. *Error in the Jury Verdict*

Defendant contends there was judicial error in the verdict on count two, which improperly stated: "We, the jury . . . find the defendant, THOMAS HILL, GUILTY of the crime of violation of Section 4502(a) of the Penal Code . . . (prisoner in possession of a weapon), as charged in *Count One* of the Information."

(Italics added.) Count one of the Information charged defendant with the section 4501 offense of assault with a deadly weapon by a prisoner; count two charged the section 4502, subdivision (a), weapon possession offense. Defendant suggests that this was an error by the trier of fact and therefore a substantive judicial error. He contends such error deprived him of his right to a jury trial with respect to count two. We disagree.

"The distinction between clerical error and judicial error is "whether the error was made in rendering the judgment [judicial], or in recording the judgment rendered [clerical]."" (In *Re Daoud* (1976) 16 Cal.3d 879, 882.)

Here, there is nothing in the record to suggest the error in the verdict form on count two was anything but an error in recording the judgment rendered, and hence a clerical error. The court instructed the jury that defendant was accused in

count two of violating section 4502, subdivision (a) (prisoner in possession of a weapon), and defined the elements of the crime. In response to a jury question during deliberations as to the specific nature of the charge in count one, the court directed the jury to the written instructions that set forth the definitions and elements of the offenses charged in counts one and two. Counsel on both sides discussed count two and the elements of possession of a deadly weapon by an inmate.

Accordingly, we find that the error was clerical error and through this opinion correct it. "[A] court has the inherent power to correct clerical errors in its records[.]'" (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The verdict form on count two was based on the charge in count two of the information. The judgment is affirmed. There is no need to correct the abstract of judgment because it correctly reflects the charged count.

DAVIS, Acting P.J.

We concur:

RAYE, J.

HULL, J.